

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter WILLIAM J. CIEMINSKI and DEPARTMENT OF THE ARMY,
FORT McCOY, WI

*Docket No. 00-851; Submitted on the Record;
Issued December 12, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant had a loss of wage-earning capacity from July 10, 1989 to May 8, 1991.

This case is on appeal before the Board for the second time. Previously, the Board set aside the June 10, 1996 decision of the Office of Workers' Compensation Programs, which determined that appellant had no loss of wage-earning capacity effective July 10, 1989.¹ The Board found that the Office had neglected to consider appellant's intermittent employment status when calculating his average annual earnings and remanded the case for a proper determination of appellant's pay rate at the time of his April 8, 1987 injury and at the time of his recurrence of disability on December 4, 1988.

In a decision dated September 13, 1999, the Office found that appellant's actual wages of \$323.60 a week in July 1989 exceeded both the wages earned on April 8, 1987 and those earned on December 4, 1988. Consequently, the Office concluded that appellant had no loss of wage-earning capacity.

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity from July 10, 1989 to May 8, 1991.

At the time of his April 8, 1987 employment injury, appellant worked on an "on call" basis as a motor vehicle operator. Appellant returned to work as a motor vehicle operator on May 29, 1987 and continued in this capacity until December 3, 1988, when his driver's license was revoked due to his employment injury. The Office subsequently paid disability compensation based on a recurrence of disability effective December 4, 1988. On July 10, 1989 appellant returned to full-time employment in a temporary position as a custodial work inspector. He held this position until May 9, 1991.

¹ Docket No. 97-95 (issued July 6, 1999). The Board's decision is incorporated herein by reference.

In accordance with the Board's instructions, the Office calculated appellant's relevant pay rates consistent with the requirements of 5 U.S.C. § 8114(d). The record indicates that he worked on an intermittent basis in the year prior to his April 8, 1987 injury. He maintained a similar work schedule in the year prior to his recurrence of disability on December 4, 1988. In light of appellant's intermittent work schedule, the Office properly calculated his average weekly wage in accordance with the formula outlined in section 8114(d)(1)(B).²

At the time of his initial injury in April 1987, appellant was compensated at an hourly rate of \$8.85. In the year prior to his injury, he averaged 18.58 hours of work a week. Applying the formula under section 8114(d)(1)(B), the Office calculated an average annual wage of \$8,202.00 and a corresponding average weekly pay rate of \$157.73.

The Office further determined that as of July 10, 1989, appellant's date-of-injury job would have paid him an hourly rate of \$9.29, which corresponded to an average weekly pay rate of \$172.67. The Office then calculated appellant's effective pay rate on the date of his recurrence of disability on December 4, 1988. In the year prior to his recurrence of disability, appellant worked an average of 33.18 hours a week at an hourly rate of \$9.66. Again, applying the appropriate formula under section 8114(d)(1)(B), the Office calculated an average annual wage of \$16,023.00 and a corresponding average weekly pay rate of \$308.13.

When appellant returned to full-time employment on July 10, 1989 as a custodial work inspector, he earned \$8.09 an hour, which corresponded to an average weekly salary of \$323.60.

The Office correctly noted that appellant's July 10, 1989 average weekly earnings as a custodial work inspector exceeded his average weekly earnings at the time of his initial injury as well as the earnings he would have received effective July 10, 1989 in his date-of-injury job. Additionally, appellant's average weekly salary of \$323.60 beginning July 10, 1989 exceeded the average weekly earnings of \$308.13 he was receiving at the time of his recurrence of disability on December 4, 1988. Accordingly, the Office properly concluded that appellant did not sustain a loss of wage-earning capacity from July 10, 1989 through May 8, 1991.

² 5 U.S.C. § 8114(d) provides for the determination of average annual earnings as follows:

- (1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
 - (A) was fixed, the average annual earnings are the annual rate of pay; or
 - (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 4-day week.

The September 13, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 12, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member